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The Honorable U.S. Court of Appeals for the Sixth Circuit  
540 Potter Stewart U.S. Courthouse  
100 East Fifth Street  
Cincinnati, Ohio 45202

Re: *Nat'l Cotton Council of Am. v. U.S. Envtl. Prot. Agency*, No. 06-4630 (and consolidated cases); Amicus Letter of Todd Staples, Texas Commissioner of Agriculture

To the Honorable U.S. Court of Appeals for the Sixth Circuit:

Todd Staples, Texas Commissioner of Agriculture, respectfully submits the following amicus letter in support of the position of Respondent-Intervenors American Farm Bureau Federation, et al., as stated in Respondent-Intervenors' Petition for Panel Rehearing and Rehearing En Banc.

**A. The Texas Department of Agriculture**

The Texas Department of Agriculture ("TDA") is the agency of the State of Texas responsible for encouraging "the proper development and promotion of agriculture, horticulture, and other industries that grow, process, or produce products" in the state. TEX. AGRIC. CODE § 12.002 (Vernon 2004). The TDA is tasked with maintaining an economic development program for rural areas, *id.* § 12.027, and is

responsible for programs focusing on agricultural research and promotion.<sup>1</sup> In Texas, the TDA is the “lead agency in the regulation of pesticide use and application and is responsible for coordinating activities of state agencies” with respect to pesticide and herbicide regulation. *Id.* § 76.101(a), *see generally* TEX. AGRIC. CODE § 76.001, *et seq.* (Vernon 2004 & Supp. 2008). TDA is also responsible for submitting the State’s plan for the licensing of pesticide applicators to the U.S. Environmental Protection Agency (“EPA”). *Id.* § 76.101(a).

### **B. The Commissioner of Agriculture**

The Texas Commissioner of Agriculture is a state official elected for a term of four years by statewide election. *Id.* § 11.004. Commissioner of Agriculture Todd Staples is responsible for directing the TDA and for “exercising the powers and performing the duties assigned to the department” by law. *Id.* § 11.001.

### **C. The Texas Pesticide Program**

Texas has an extensive program of pesticide regulation. Texas law prohibits a person from using a restricted-use or state-limited-use pesticide or regulated herbicide unless licensed or certified by the TDA. *Id.* § 76.105. Applicators must

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<sup>1</sup> *See, e.g.*, TEX. AGRIC. CODE ch. 18 (relating to organic and agricultural product certification), chs. 41-50 (relating to agricultural research and promotional programs), and chs. 71-79 (relating to control of horticultural diseases and pests) (Vernon 2004 & Supp. 2008).

keep records of pesticide applications for two years. *Id.* § 76.114. Commercial applicators must have insurance and register their equipment. *Id.* § 76.111(c). All applicators must obtain continuing education units to renew their license. TEX. AGRIC. CODE § 76.113(d) (Vernon Supp. 2008).

#### **D. State-Federal Relations**

This regulatory program involves significant state-federal interaction. Section 24 of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) provides that a state may regulate the sale or use of a federally registered pesticide or device, but only if and to the extent the regulation does not permit any sale or use prohibited by FIFRA. *See* 7 U.S.C. § 136v. Additionally, Section 23 of FIFRA provides that the EPA Administrator may enter into a cooperative agreement with a state to delegate authority to cooperate in the enforcement of FIFRA. *See* 7 U.S.C. § 136u.

TDA, as the lead agency for pesticide regulation in Texas, enters into a cooperative agreement with the EPA each year to administer the enforcement of federal pesticide laws and regulations. TDA maintains a State Plan that provides for the certification and recertification of pesticide applicators, and licenses more than 66,000 pesticide applicators.<sup>2</sup> There is no data to show the number of individual

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<sup>2</sup> TEXAS DEP’T OF AGRICULTURE; BRIDGE and Structural Licensing Systems (April 20, 2009) (internal database printout, available from Jimmy Bush, Asst. Comm’r for Pesticide Programs, TDA).

pesticide applications conducted in Texas, but because of the population and agricultural diversity of the State, the number is probably in the hundreds of thousands each year.

Additional permitting or regulatory requirements for pesticides would have a negative impact on the TDA's capability to perform its regulatory responsibilities adequately and would jeopardize the agency's effectiveness in protecting human health and the environment. Certified or licensed applicators in Texas must complete training requirements. *See* TEX. AGRIC. CODE § 76.113(d) (Vernon Supp. 2008). TDA would be faced with the dilemma of having to allocate additional resources to conduct its training and regulatory activities with no assurance that any increased federal funding would be forthcoming. TDA could be forced to reduce or eliminate pesticide program services, or to use its resources in the permitting process, with little or no funding left for enforcement and oversight. TDA has no data supporting the proposition that requiring a pesticide applicator to obtain an NPDES permit, besides meeting current training requirements, would further the Clean Water Act's objectives of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.

#### **E. Effect on the Agriculture Industry**

A vibrant agriculture industry is vital to economic stability, the viability of

rural communities and the sustainability of a safe and abundant food supply for the nation and the world. The economic impact of agriculture in Texas exceeds \$100 billion per annum and it is a crucial part of the state's economy.<sup>3</sup> Texas producers have a longstanding reputation of being good stewards of the state's natural resources.

Treating pesticide application as the discharge of a pollutant from a point source would hinder the voluntary and regulatory efforts that have allowed Texas agricultural producers to sustain production while ensuring the protection of water quality and public health. These efforts provide the best protection of the State's waters from impairment due to pesticide use. Vacating the EPA's Final Rule on aquatic pesticides, and extending the analysis to terrestrial applications, would place agricultural producers in legal jeopardy under the citizens' suit provisions of the federal Clean Water Act.

If the Final Rule is vacated, agricultural production in Texas will suffer tremendously at a time when the economic downturn and ongoing drought conditions

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<sup>3</sup> See NATIONAL AGRICULTURE STATISTICS SERVICE, 2007 CENSUS OF AGRICULTURE (available at [www.nass.usda.gov](http://www.nass.usda.gov)); NATIONAL AGRICULTURE STATISTICS SERVICE, QUICK STATS (available at [http://www.nass.usda.gov/Data\\_and\\_Statistics/Quick\\_Stats/index.asp](http://www.nass.usda.gov/Data_and_Statistics/Quick_Stats/index.asp)); AGRILIFE RESEARCH & EXTENSION, TEXAS A&M UNIV. SYSTEM, pub. MKT 3579, THE FOOD & FIBER SYSTEM AND PRODUCTION AGRICULTURE'S CONTRIBUTIONS TO THE TEXAS ECONOMY (Jan. 2009).

already strain the viability of many producers. Public health will be at greater risk because of delays in permitting pesticide applications needed to prevent or respond to mosquito infestations. Natural resources may be degraded due to additional regulatory burdens that hinder the control of invasive species.

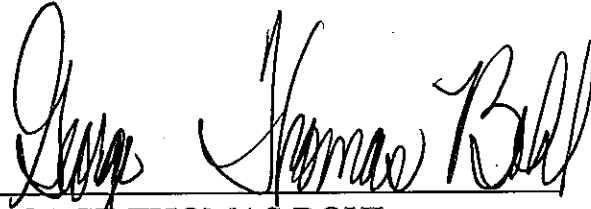
Current regulatory programs in Texas show that the use of pesticides in agriculture gives producers the tools to combat weeds and pests without posing unreasonable risks to the environment. Further regulatory constraints will cause unnecessary delays and expense to both the state and the producers, and will not add to the protection of natural resources or the public health.

Because of the interests and concerns stated above, Commissioner Staples supports the position of Respondent-Intervenors American Farm Bureau Federation, et al., as stated in Respondent-Intervenors' Petition for Panel Rehearing and Rehearing En Banc, and requests that rehearing be granted.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

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1. This amicus letter complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- ☒ this letter contains 1,156 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
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Dated: April 20, 2009